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No. 89-478

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

STATE OF MARYLAND,
Petitioner,

v.

SANDRA ANN CRAIG,
Respondent.

On Writ of Certiorari to the Court of Appeals of Maryland

BRIEF OF THE STEPHANIE ROPER FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Where individualized findings regarding the need to protect child witnesses are made and the witnesses, ages four to seven, are subjected to cross-examination at trial, does the Sixth Amendment's Confrontation Clause require a face-to-face meeting between the witnesses and the accused before a one-way closed-circuit television procedure may be invoked?

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BRIEF OF THE STEPHANIE ROPER FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This *amicus curiae* brief is submitted in support of petitioner, the State of Maryland. By letters filed with the Clerk of the Court, petitioner and respondent have consented to the filing of this brief.

INTERESTS OF *AMICUS CURIAE*

The Stephanie Roper Foundation is a volunteer, nonprofit corporation based in Maryland. The organization was named in memory of Stephanie Roper, a young Maryland woman who was kidnapped, raped repeatedly, tortured and murdered. Thereafter, her killers were given concurrent sentences which made them eligible for parole in 11 years. The Foundation, established by the parents of Stephanie Roper, was formed in response to problems within the criminal justice system in its treatment of victims of crime. The purpose of the Foundation is to conduct research and analysis of criminal justice issues as well as to increase public awareness of victims' rights

and problems of the criminal justice system. The Foundation seeks to educate the public and to advocate the fair treatment of crime victims so that in Maryland the criminal justice system will treat victims and their families with courtesy, respect, dignity, compassion and justice.

SUMMARY OF ARGUMENT

This case presents the question whether the Confrontation Clause requires four children, ages four to seven, who have suffered from repeated sexual abuse, to testify in the physical presence of their alleged assailant at her criminal trial. The Maryland Court of Appeals answered this question affirmatively, holding that child-abuse victims could virtually never testify in criminal proceedings except during a face-to-face encounter with the defendant. Our Constitution is not so brutal. As we show below, the Confrontation Clause permits video testimony where the trial court determines that a face-to-face encounter would likely cause emotional harm to a child-abuse victim or prevent the victim from effectively communicating.

The Sixth Amendment does not impose any absolute requirement of a face-to-face encounter between a criminal defendant and the witnesses against him. This Court has specifically held that the Confrontation Clause establishes only a "preference" for face-to-face encounters and that considerations of public policy may overcome this preference in appropriate cases. *Ohio v. Roberts*, 448 U.S. 56, 63 (1980); *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). Indeed, an absolute requirement of face-to-face encounters would be squarely contrary to many of this Court's decisions involving the hearsay rule, and would be a radical departure from the Court's understanding of other important Constitutional protections.

Governmental efforts to protect child-abuse victims from face-to-face encounters with their alleged assailants are supported by the most compelling of public policies. It requires no citation to prove that nothing we have is more precious than our children. And this Court

has repeatedly recognized the unique vulnerabilities of children and the special power of the state as *parens patriae* to safeguard the children of its citizens. *Prince v. Massachusetts*, 321 U.S. 158, 166 & 168-69 (1944); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982). Similarly, face-to-face encounters will often subvert the truth-finding process in child-abuse cases because the victims may lose their ability to communicate their experiences.

Testimony by television does not materially compromise the Confrontation Clause's guarantees. Technological advances permit video displays that fully reveal the witness's demeanor to both the defendant and the jury. At the same time, telephones allow defense counsel to confer freely and privately with the defendant while cross-examining the child witness. Other provisions of the Constitution—like the First and Fourth Amendments—have long been interpreted as applying to modern technologies. *Katz v. United States*, 389 U.S. 347 (1967). Similarly, the Confrontation Clause should be satisfied by new modes of "confrontation," that the Framers could not have foreseen, but that provide the functional equivalent of face-to-face encounters.

The trial judge in the present case found, based on the expert testimony of therapists who had treated the child-abuse victims, that a face-to-face encounter with the defendants would likely cause emotional harm. Relying on that determination, he permitted the victims to testify by one-way closed circuit television. The Maryland Court of Appeals reversed the trial court's decision. The Court of Appeals adopted a "least restrictive means" test, which required that the child-abuse victims be compelled to attempt to testify in the defendant's presence—and fail—before televised testimony would be permitted.

Nothing in the Confrontation Clause compels child-abuse victims to endure such ordeals. Perversely, the Court of Appeals' ruling would require the state—as a condition of permitting televised testimony—to inflict upon child-abuse victims the very emotional harm that

televised testimony seeks to prevent. Such an irrational and callous requirement is all the more inappropriate because televised testimony provides a functional equivalent to face-to-face encounter that does not materially compromise the defendant's Confrontation Clause rights. Rather, the appropriate Confrontation Clause standard is that a child-abuse victim may testify by television provided that the trial court determines that a face-to-face encounter with the defendant would likely cause emotional harm or prevent the victim from effectively communicating.

ARGUMENT

I. The Confrontation Clause Establishes Only a Preference for "Face-to-Face" Encounters Which May Be Overcome by Compelling Public Policies

The Sixth Amendment provides broadly that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Nothing in the language or the history of this Clause confers any absolute right to a face-to-face encounter between a criminal defendant and the witnesses against him. The Court said precisely this in *Ohio v. Roberts*, where it held that the Confrontation Clause creates only a "preference" for face-to-face confrontation at trial and that "competing interests" may overcome this preference.[1] Put differently, "[o]f course, the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process."[2]

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[1] 448 U.S. at 63-64; *see also Coy v. Iowa*, 108 S. Ct. 2798, 2804 (1988) (O'Connor, J., concurring). Indeed, the Court in *Roberts* allowed admission of the prior testimony of an unavailable witness because of the public's "strong interest in effective law enforcement, and in the development and precise formulation of the rules of evidence applicable in criminal proceedings."

[2] *Chambers v. Mississippi*, 410 U.S. at 295; *see also Snyder v. Massachusetts*, 291 U.S. 97, 106-07 (1934) (Cardozo, J.) ("Nor has the privilege of confrontation at any time been without recognized exceptions, as for instance dying declarations or documentary evidence. . . . *The exceptions are not even static, but may*

There are compelling reasons not to disturb this Court's settled understanding that the Confrontation Clause creates no absolute right to face-to-face encounters. First, such a view would prohibit—as a matter of federal constitutional law—virtually all exceptions to the hearsay rule. "If one were to read [the Confrontation Clause] literally, it would require, on objection, the exclusion of any statement made by a declarant not present at trial."[3] This Court has long and repeatedly held that the Confrontation Clause imposes no such requirement.

Nearly a hundred years ago, in *Mattox v. United States*, for example, the Court rejected a Confrontation Clause challenge to the reading of a deceased witness' prior testimony at a defendant's retrial.[4] It reached this result notwithstanding the fact that the defendant was obviously unable to confront the witness at the second trial, reasoning that:

> there could be nothing more directly contrary to the letter of the [Confrontation Clause] than the admission of dying declarations. They are rarely made in the presence of the accused; they are made without any opportunity for examination or cross-examination; nor is the witness brought face to face with the jury; yet from time immemorial they have been treated as competent testimony, and no one would have the hardihood at this day to question their admissibility. . . . [G]*eneral rules of law of this kind, however beneficient in their operation and valuable to the accused, must occasionally give way to con-*

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be enlarged from time to time if there is no material departure from the reason of the general rule." (emphasis added).

[3] *Ohio v. Roberts*, 448 U.S. at 63. *See also* 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 800[04], at 800-19 to -20 (1988) ("Taken literally this clause could mean that no evidence falling within a hearsay objection may be admitted against an accused unless the declarant is available to testify."); Westen, *The Future of Confrontation*, 77 Mich. L. Rev. 1185, 1200-01 n.65 (1979).

[4] 156 U.S. 237 (1895).

> *siderations of public policy and the necessities of the case. . . . The law, in its wisdom, declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.*[5]

More recently, this Court has approved the admissibility of testimony where no face-to-face encounter *ever* occurred, upholding the admission of hearsay statements of non-testifying coconspirators.[6]

If the Confrontation Clause imposed some absolute face-to-face encounter requirement, then all of these decisions would have been wrongly decided. Indeed, such requirement would see the Confrontation Clause wielded to overturn major aspects of our evidentiary system which has evolved—without significant doubt as to its constitutionality—for more than two centuries.[7]

Second, the historical record surrounding the Clause is at best fragmentary and, to the extent that some original intent may be discerned, it shows that no absolute requirement of face-to-face encounters was contemplated by the Framers. Thus, as Justice Harlan has explained, "[i]t is common ground that the historical understanding of the [Confrontation] Clause furnishes no solid guide to adjudication. . . . Such scant evidence as can be culled from the usual sources suggests that the Framers understood 'confrontation' to be something less than a right to exclude hearsay. . . ." [8]

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[5] 156 U.S. at 243-44; *see also Reynolds v. United States*, 98 U.S. 145 (1878).

[6] *Bourjaily v. United States*, 483 U.S. 171 (1987); *United States v. Inadi*, 475 U.S. 387 (1986).

[7] There are 24 exceptions to the hearsay rule, as set forth in the Federal Rules of Evidence, that apply regardless whether the declarant is available for cross-examination.

[8] *Dutton v. Evans*, 400 U.S. 74, 95 (1970) (Harlan, J., concurring in result).

And early decisions—like *Mattox* and *Reynolds*—quite clearly rejected any rigidly literal view of the Confrontation Clause. Indeed, according to Dean Wigmore, "[t]here never was at common law any recognized right to an indispensable thing called confrontation *as distinguished from cross-examination.*" [10] In light of this historical record, basic principles of judicial restraint and deference to popularly-elected state legislatures counsel firmly against any absolutist interpretation of the Confrontation Clause.

Third, the notion that a defendant's confrontation rights are not absolute, and may be overidden by competing public policies, should be neither surprising nor unusual. Rather, such an approach simply mirrors this Court's analysis of other important constitutional rights. For example, this Court has repeatedly held that the First

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[9] *California v. Green*, 399 U.S. 149, 174-75 (1970) (Harlan, J., concurring); *see also id.* at 176 ("[T]he Confrontation Clause was apparently included without debate along with the rest of the Sixth Amendment package of rights—to notice, counsel, and compulsory process—all incidents of the adversarial proceeding before a jury as evolved during the 17th and 18th centuries."). As to the state of the historical record, Justice Harlan remarked that "my own research satisfies me that the prevailing view—that the usual primary sources and digests of the early debates contain no informative material on the confrontation right—is correct." *Id.* at 176 n.8. *See also* R. Rutland, *The Birth of the Bill of Rights* 202-17 (1955); Baker, *The Right to Confrontation, the Hearsay Rules and Due Process—A Proposal for Determining When Hearsay May Be Used in Criminal Trials*, 6 Conn. L. Rev. 529, 532 & n.15 (1974); Lilly, *Notes on the Confrontation Clause and* Ohio v. Roberts, 36 U. Fla. L. Rev. 207, 208-17 (1984) ("Omissions and ambiguities in the historical record have fueled the wide-ranging debate about the meaning of the confrontation clause."); Recent Development, *The Confrontation Clause Applied to Minor Victims of Sexual Abuse*, 42 Vand. L. Rev. 1511, 1515 & n.25 (1989).

[10] 5 J. Wigmore, *Evidence in Trials at Common Law* § 1397, at 158 (Chadbourn rev. 1974) (emphasis in original).

Amendment's literal command that Congress make no law abridging the freedom of speech "is not an unlimited, unqualified right, but . . . must, on occasion, be subordinated to other values and considerations." [11] This Court's Equal Protection jurisprudence is no different. In *Williamson v. Lee Optical of Oklahoma, Inc.*, the Court held that commercial regulations would be upheld against Equal Protection challenges so long as they were reasonably related to some legitimate governmental interest.[12] And, this Court has held that race-based classifications may be sustained if necessary to promote a compelling state interest.[13] Finally, earlier this Term the Court held that the Fifth Amendment privilege of a child's custodian can be overridden by a court order to produce the child.[14] Just as all of these fundamental constitutional rights are not absolute, the Sixth Amend-

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[11] *Dennis v. United States*, 341 U.S. 494, 503 (1951); *see also Konigsberg v. State Bar of California*, 366 U.S. 36 (1961). In *Konigsberg*, Justice Harlan, for the Court, wrote:

> [W]e reject the view that freedom of speech and association . . . as protected by the First and Fourteenth Amendments, are "absolutes," not only in the undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment.

Id. at 49.

[12] 348 U.S. 483 (1955).

[13] *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

[14] *Baltimore City Dept. of Social Services v. Bouknight*, Nos. 88-1182 & 88-6651, slip op. at 5 (U.S. Feb. 20, 1990). Even though the defendant's act of turning the child over was testimonial (and might aid a subsequent criminal prosecution), this Court reasoned that the State had a legitimate regulatory interest in the child's safety; thus, the trial court could properly issue an order, enforceable by its contempt power, requiring that the defendant turn the child over to state authorities. *Id.*, slip op. at 4-12. The Court did note, however, that limitations might exist upon the State's ability to use the testimonial aspects of defendant's act of production in subsequent criminal proceedings. *Id.*, slip op. at 11-12.

ment's "preference" for face-to-face encounters is similarly not absolute and must, in appropriate cases, give way to competing public policies.

Finally, it is also clear that the Confrontation Clause was designed principally to accomplish objectives *other than* requiring face-to-face encounters. As Dean Wigmore has explained, "[t]he main and essential purpose of confrontation is to secure for the opponent the opportunity for cross-examination." [15] This Court has also long

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[15] 5 J. Wigmore, *supra*, § 1395, at 150; *see also id.* ("The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination . . . ."). Other commentators have concurred with Wigmore as to the primacy of cross-examination as an element of the right of confrontation. *See, e.g.*, E. Cleary, *McCormick on Evidence* § 252 (1984); 4 D. Louisell & C. Mueller, *Federal Evidence* § 418 (1980); 4 J. Weinstein & M. Berger, *supra*, at ¶ 800[04].

Wigmore also recognized that a "secondary and dispensable element" of the right of confrontation also existed at common law: the witness's presence before the factfinder "so that his demeanor while testifying may furnish such evidence of his credibility as can be gathered therefrom." 5 J. Wigmore, *supra*, at § 1399 at 199. Wigmore expressly stated that this latter element did not require a face-to-face confrontation between the witness and the defendant—it would be satisfied "if the *witness*, throughout the material part of his testimony, is *before the tribunal* where his demeanor can be adequately observed." *Id.* (emphasis in original). As historical support for his position, Wigmore cited the trial for treason of the Earl of Stafford before the Lords at Westminster in 1680. *Id.* at 200 n.2. The relevant portion of that trial transcript reads as follows:

> Stafford: I beg your lordships that [the witness] may look me in the face, and give his evidence, as the law is.
>
> Sir John Trevor: My lords, if this noble lord, the prisoner at the bar, will have the witness to look him continually in the face, the court will not hear half his evidence: *we desire he may address himself, as the law is, to your lordships and the judges.*
>
> Stafford: I desire the letter of the law, which says, my accuser shall come face to face.
>
> [the Witness]: My lords, I am willing to do as your lordships shall order.

[Continued]

emphasized that other incidents of the Confrontation Clause—principally the right of cross-examination—are the paramount objectives of the Clause.[16] At least where these principal purposes of the Confrontation Clause are safeguarded, there is little cause for straining to ensure opportunities for a face-to-face confrontation. Particularly is this so since even the right to cross-examination—the central protection of the Clause—may be overcome by competing public policies.[17]

II. Compelling Public Policies Permit Shielding a Child Abuse Victim from Face-to-Face Encounters with the Defendant

Compelling public policy considerations clearly require shielding a child-abuse victim from face-to-face encounters

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[15] [Continued]

Lord High Stewart: *My lord, you do see the witness, that is enough for face to face . . .*

In re Stafford [1680] 7 How. St. Tr. 1293, 1341 (emphasis added). This procedure, whereby the accused could see the witness but apparently the witness could not see the accused, is functionally equivalent to the one-way closed-circuit broadcast employed in this case.

[16] In *Mattox v. United States*, 156 U.S. at 242, the Court recognized that the primary purpose of the Confrontation Clause was to prevent the admission at a criminal trial of *ex parte* affidavits, where the accused did not have the opportunity of "testing the recollection and sifting the conscience of the witness." And in *Douglas v. Alabama*, 380 U.S. 415, 418 (1965), this Court wrote that "[o]ur cases construing the [Confrontation C]lause hold that a primary interest secured by it is the right of cross-examination; an adequate opportunity for cross-examination may satisfy the clause even in the absence of physical confrontation." *See also Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986); *Davis v. Alaska*, 415 U.S. 308, 315 (1974); *Bruton v. United States*, 391 U.S. 123, 126 (1968); *Barber v. Page*, 390 U.S. 719, 721 (1968); *Pointer v. Texas*, 380 U.S. 400, 406-07 (1965); Note, *Reconciling the Conflict Between the Coconspirator Exemption from the Hearsay Rule and the Confrontation Clause of the Sixth Amendment*, 85 Colum. L. Rev. 1294, 1302 (1985).

[17] *Mattox v. United States*, 158 U.S. at 243; *United States v. Inadi*, 475 U.S. 387; *Dutton v. Evans*, 400 U.S. 74.

with the defendant. We show below that such encounters may cause serious emotional damage to child-abuse victims and can subvert the truth-determining process in child-abuse cases. Moreover, technological developments have enabled trial courts to provide substitutes for face-to-face encounters that minimize the effects on values protected by the Confrontation Clause.

A. *A Face-to-Face Encounter with the Defendant May Cause Serious Emotional Damage to Child Abuse Victims*

We have nothing more precious than our children. We know this from our daily experience, which requires no citation. And we know it from our cultural traditions, which provide more citations than space permits. From the Bible, [18] through Homer, [19] Cicero [20] and the Middle Ages,[21] to classic American literature,[22] history's greatest writers have testified to the inestimable value of our children.

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[18] *Old Testament: Psalms*, cxxvii, 5 ("Happy is the man that hath his quiver full of them.")

[19] Homer, "Apothe[illegible]s No. 13" (c. 850 B.C.), *in The Contest of Homer and Hesiod, reprinted in* B. Stevenson, *Home book of proverbs, maxims, and familiar phrases* (1965) ("Children are a man's crown.").

[20] Cicero, "Post Reditum ad Quiriles," Ch. i, sec. 2 (37 B.C.), *reprinted in* B. Stevenson, *Home book of proverbs, maxims, and familiar phrases* (1965) ("Of all nature's gifts to the human race, what is sweeter to a man than his children?").

[21] Torriano, *Piazza Universale* 89 (1666), *reprinted in* B. Stevenson, *Home book of proverbs, maxims, and familiar phrases* (1965) ("He that has no children knows not what is love.").

[22] C. Dickinson, "The Children," *reprinted in* B. Stevenson, *Home book of proverbs, maxims, and familiar phrases* (1965) ("They are angels of God in disguise."); Longfellow, "Children," St. 9, *The Poetical Works of Longfellow* (1975) ("Ah! What would the world be to us if the children were no more?"); Whittier, "Child-Songs," *reprinted in* B. Stevenson, *Home book of proverbs, maxims, and familiar phrases* (1965) ("The child must teach the man.").

At the same time, children are among the most vulnerable members of our society. Thus, the law has long recognized the special responsibilities and powers of the state in protecting children. This is embodied in the ancient authority of the several states, as *parens patriae*, to protect children within their jurisdiction.[23] As one early decision put it,

> It is the unquestioned right and imperative duty of every enlightened government, in its character of *parens patriae*, to protect and provide for the comfort and well-being of such of its citizens as by reason of infancy . . . are unable to take care of themselves. The performance of this duty is justly regarded as one of the most important of governmental functions and all constitutional limitations must be so understood and construed as not to interfere with its proper and legitimate exercise.[24]

Accordingly, the States have long retained the ultimate power over child custody,[25] and have routinely legislated

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[23] *See Ginsberg v. New York*, 390 U.S. 629, 639 (1968) ("The well-being of its children is of course a subject within the State's constitutional power to regulate . . . ."); *Cactus Corp. v. State ex rel. Murphy*, 14 Ariz. App. 38, 480 P.2d 375 (1971); *In re Vasko*, 238 A.D. 128, 263 N.Y.S. 552 (1933).

In addition, the special place of children is reflected in various aspects of American tort law, *e.g.*, W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts* 1071-72 (5th ed. 1984) ("practical effect" of immunity from tort liability for infants); Restatement (Second) of Torts 283A (1965); *DeLuca v. Bowden*, 42 Ohio St. 2d 392, 329 N.E.2d 109 (1975); and contract law. *E.g.*, 1A A. Corbin, *Corbin on Contracts* § 227, at 335-39 (1963); 2 S. Williston, *A Treatise on the Law of Contracts* §§ 222-248, at 7-76 (3d ed. 1959); Restatement (Second) of Contracts § 14, at 37-41 (1981).

[24] *Oakes v. Oakes*, 45 Ill. App. 2d 387, 195 N.E.2d 840, 844 (1964); *see also Van Walters v. Board of Children's Guardians*, 132 Ind. 567, 32 N.E. 568 (1892); *Stubbs v. Hammond*, 257 Iowa 1071, 135 N.W.2d 540 (1965).

[25] *Hersey v. Hersey*, 271 Mass. 545, 171 N.E. 815 (1930); *Mitchell v. Davis*, 205 S.W.2d 812 (Tex. Civ. App. 1947) (*writ ref.*); *Turner v. Children's Home Soc'y*, 158 Va. 406, 163 S.E. 399 (1932).

in countless ways to ensure the health and safety of children.[26]

The unique importance and vulnerability of children is likewise reflected in this Court's constitutional decisions. Thus, in *Prince v. Massachusetts*, this Court rejected a First Amendment challenge to a statute forbidding children from selling newspapers in public places. The Court reasoned that:

> The state's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities and in matters of employment. *A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens* . . . . Among evils most appropriate for such action are the crippling effects of child employment, more especially in public places . . . . It is too late now to doubt that legislation appropriately designed to reach such evils is within the state's police power . . . .[27]

Elsewhere, this Court has expressly recognized that there is a compelling state interest in "safeguarding the physical and psychological well-being of a minor."[28] And this Court has repeatedly "sustained legislation aimed at protecting the physical and emotional well-being of youth

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[26] *Chesapeake & O. Ry. Co. v. Stapleton*, 279 U.S. 587 (1929); *People v. Walton*, 70 Cal. App. 2d Supp. 862, 161 P.2d 498 (1945); *Dezarn v. Commonwealth*, 195 Ky. 686, 243 S.W. 921 (1922); *Thistlewood v. Trial Magistrate*, 236 Md. 548, 204 A.2d 688 (1964).

[27] 321 U.S. 158, 168-69 (1944) (emphasis added); *see also id.* at 166 ("But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. . . . And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways.").

[28] *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982).

even when the laws have operated in the sensitive area of constitutionally protected rights." [29]

The present case squarely implicates a compelling public interest in protecting our children from sexual abuse and emotional harm. The sexual abuse of children is a profoundly disturbing national tragedy. One well-respected researcher has found that one of every 5 women, and one out of every 11 men had been sexually victimized as children.[30] More recent studies indicate that actual incidence of abuse may be even higher.[31] According to some studies, nearly 2,000,000 children are sexually molested each year.[32]

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[29] *New York v. Ferber*, 458 U.S. 747, 756-57 (1982). In *Bethel School District No. 403 v. Fraser*, the Court observed that its "First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children." 478 U.S. 675, 684 (1986); *see also Ginsberg v. New York*, 390 U.S. at 640 ("The State . . . has an independent interest in the well-being of its youth"; "society[has a] transcendent interest in protecting the welfare of children" (quoting *People v. Kahan*, 15 N.Y.2d 311, 206 N.E.2d 333, 334 (1965)).

[30] D. Finkelhor, *Sexually Victimized Children* 57 (1979).

[31] *See, e.g.*, American Association for Protecting Children, *Highlights of Official Child Neglect and Abuse Reporting 1985* 16 (1987) (hereinafter "*Highlights*") (from 1976 through 1985 the reported incidence of sexual abuse per 10,000 children increased from less than 1% to 17.9%); American Bar Association, *Guidelines for the Fair Treatment of Child Witnesses in Cases Where Child Abuse is Alleged* 7 (1985) (study indicating that as many as one in every three female adults was sexually abused as a child).

[32] *See, e.g., Highlights, supra*, at 3 (reports of child abuse increased from an annual rate of 669,000 in 1976 to over 1.9 million in 1985); *Studies Find Sexual Abuse of Children is Widespread*, N.Y. Times, May 13, 1982, at C1, col. 1, C10, col. 2 (an American Humane Society study showed an increase of 200% in the reporting of sexual abuse from 1976 to 1980); *A Hidden Epidemic*, Newsweek, May 14, 1984, at 33 ("[S]omewhere between 100,000 to 500,000 American children will be molested this year."); *Child Sexual Abuse Victims in the Courts: Hearings Before the Subcomm. on Juvenile Justice of the Senate Comm. on the Judiciary,*

The evidence is likewise overwhelming that the victims of child sexual abuse are likely to suffer further harm if they are forced physically to confront their abusers at trial. According to one authority:

> Psychiatrists have identified components of the legal proceedings that are capable of putting a child victim under prolonged mental stress and endangering his emotional equilibrium: repeated interrogations and cross-examination; *facing the accused again*; the official atmosphere in court; the acquittal of the accused for want of corroborating evidence to the child's trustworthy testimony; and the conviction of a molester who is the child's parent or relative.[33]

Other authorities have also warned of the danger—acted on by a majority of the several states—that a face-to-face encounter with the defendant can seriously harm a child abuse victim.[34]

98th Cong., 2d Sess. 77 (1984) ("The molestation of children has now reached epidemic proportions. Even by conservative estimates, a young American will be sexually molested once every two minutes."); *Abused Children in America: Victims of Official Neglect, Report of the Select Comm. on Children, Youth and Families*, H.R. Rep. No. 260, 100th Cong., 1st Sess. (1987).

[33] Libai, *The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System*, 15 Wayne L. Rev. 977, 984 (1969) (emphasis added).

[34] Parker, *The Rights of Child Witnesses: Is The Court A Protector Or Perpetrator?*, 17 New Eng. L. Rev. 643, 644 & 646 (1982) ("While the assault itself is emotionally damaging [to the child victim], the ordeal of bringing criminal charges can compound the danger"; "psychological studies conducted during the last thirteen years have indicated that the problem is even more serious than was suggested by Libai"); Comment, *The Young Victim as Witness for the Prosecution: Another Form of Abuse?*, 89 Dick. L. Rev. 721, 732 (1985); *see also* D. Whitcomb, E. Shapiro & L. Stellwagen, *When the Victim Is a Child: Issues for Judges and Prosecutors* 17-18 (1985); Avery, *The Child Abuse Witness: Potential for Secondary Victimization*, 7 Crim. Just. J. 1, 3-4 (1983); Myers, *The Legal Response to Child Abuse: In the Best Interest of Children?*, 24 J. Fam. L. 149, 182-84 (1985-86); Weisberg, *Sexual Abuse of Children: Recent Developments in the Law of Evidence*, Children's Legal Rights J., Fall 1984, at 2.

This Court has previously declined to give unlimited compass to Confrontation Clause rights where a state sought to protect the welfare of abused children, even where that means did not promote truth-seeking goals. In *Pennsylvania v. Ritchie*, this court denied defense counsel direct access to the file maintained by the state agency relating to the abused child, the 13-year-old daughter of defendant, holding that *in camera* review for exculpatory information by the trial court was sufficient. Even though this rule would deprive defendant of "the benefits of an 'advocate's eye,'" this Court reasoned that "[t]o allow full disclosure to defense counsel in this type of case would sacrifice unnecessarily the Commonwealth's compelling interest in protecting its child abuse information." [36] In sum, there plainly exists a compelling public interest in dealing with the disturbing and escalating problem of child abuse, and in safeguarding the most vulnerable and innocent members of our society from the ordeal of public, physical confrontation with their alleged assailant.[37]

B. *Face-to-Face Encounters May Subvert the Truth-Determining Process in Child Abuse Cases*

There is a second compelling public interest in shielding child-abuse victims from face-to-face encounters with

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[35] 480 U.S. 39 (1987).

[36] *Id.* at 60. The Court continued:

> If the [state agency] records were made available to defendants, even through counsel, it could have a seriously adverse effect on Pennsylvania's efforts to uncover and treat abuse. . . . [Because of the difficulty in prosecuting cases of child abuse i]t therefore is essential that the child have a state-designated person to whom he may turn, and to do so with the assurance of confidentiality. Relatives and neighbors who suspect abuse also will be more willing to come forward if they know that their identities will be protected.

Id.

[37] *See New York v. Ferber*, 458 U.S. at 757 ("The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.").

their alleged attackers. Absolute insistence upon face-to-face encounters in the present case—and in child abuse cases generally—will not only fail to serve the truth-determining process, but will in fact subvert this process. We may assume that, as to *adult* witnesses generally, testifying before the accused in open court usually serves to enhance the reliability of the evidence presented. "[T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'" [38]

As to *child* witnesses, however, a face-to-face encounter is not likely to have the same effect. The pressure and tension imposed upon an adult witness by traditional courtroom procedures will usually positively impress him or her with an appreciation of the solemnity of the occasion, and the consequent importance of telling the truth. As a clear majority of state legislatures has concluded, the more vulnerable child witness is likely to become so disturbed by the very same procedures that he or she will be rendered noncommunicative.[39]

For example, in *State v. Sheppard*, the court accepted the opinion of a forensic psychiatrist that the video testimony of the child victim, rather than testimony by means of traditional courtroom procedures, would actually *improve* its accuracy.[40] The doctor stated the basis of his opinion for the record:

> An adult witness, testifying in court, surrounded by the usual court atmosphere, aware of a black-robed judge, a jury, attorneys, members of the public, uniformed attendants, a flag, and religious overtones, is more likely to testify truthfully. The opposite is true of a child, particularly when the setting involves a relative accused by her of sexual abuse. She be-

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[38] *Coy v. Iowa*, 108 S. Ct. 2798, 2801 (1988) (quoting *Pointer v. Texas*, 380 U.S. at 404); *Ohio v. Roberts*, 448 U.S. 56, 63 n.6 (1980).

[39] Brief of *Amicus Curiae* The American Bar Association at 6 & 1a-18a, *Coy v. Iowa*, 108 S. Ct. 2798 (1988) (No. 86-6757).

[40] 197 N.J. Super. 411, 484 A.2d 1330, 1332 (1984).

> comes fearful, guilty, anxious, and traumatized. In most cases, she will have been exposed to both pleasant and abusive associations with the accused. As a consequence, she has ambivalent feelings. Anger against the relative is opposed by feelings of care, not only for him but also for other family members who may be harmed by a conviction. There is guilt as well as satisfaction in the prospect of sending the abuser to prison. These mixed feelings, accompanied by the fear, guilt, and anxiety, mitigate the truth, producing inaccurate testimony. The video arrangement, because it avoids courtroom stress, relieves these feelings, thereby improving the accuracy of the testimony.[41]

Other authorities have stated the same conclusions.[42]

Thus, the very features that the Confrontation Clause envisions as enhancing the truthfulness of testimony would, in the context of child sexual abuse cases, have exactly the opposite effect.[43] Requiring the child victim to testify in front of his or her abuser may cause an absolute inability on the part of the victim to relate the abusive events. Or testimony in the physical presence of the defendant may be so compromised by emotional distress as to render it unintelligible, unpersuasive or even inaccurate.

It requires no lengthy discussion to demonstrate that the states have entirely legitimate and compelling inter-

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[41] *Id.*

[42] Avery, *supra*, at 3-4; Comment, *The Young Victim*, *supra*, at 742 n.124 ("Face-to-face confrontation with extremely vulnerable victims, such as children, may diminish the reliability of their testimony rather than enhance it."); *see also* D. Whitcomb, E. Shapiro & L. Stellwagen, *supra*, at 51 ("Closed circuit testimony is often advocated . . . because the child simply freezes on the stand."); Note, *Parent-Child Incest: Proof at Trial Without Testimony in Court by the Victim*, 15 U. Mich. J. of L. Reform 131, 137-38 (1981).

[43] *Commonwealth v. Willis*, 716 S.W.2d 224, 230 (Ky. 1986) ("Ironically, putting the child through the ordeal of testifying in open court may denigrate the reliability of her testimony." (citing Note, *Parent-Child Incest*, *supra*, at 132).

ests in preventing such untoward developments. This Court has repeatedly held that the "mission" of the Confrontation Clause is to advance "the accuracy of the truth-determining process in criminal trials." [44] And the "truth-determining process" will be significantly advanced in a broad range of child-abuse cases by shielding child-abuse victims from face-to-face encounters with their alleged molester.

C. *Closed Circuit Testimony Does Not Materially Compromise a Defendant's Confrontation Clause Rights*

Modern technological devices permit trial courts to shield child-abuse victims from face-to-face encounters, without materially compromising the defendant's Confrontation Clause rights. In particular, closed circuit testimony by child-abuse victims preserves virtually all of a defendant's right under the Confrontation Clause.[45] The defendant and the tribunal may clearly see and hear the witness, enabling them to fully observe his or her demeanor and assess his or her credibility. The defendant's

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[44] *Dutton v. Evans*, 400 U.S. at 89 (plurality opinion); *Kentucky v. Stincer*, 482 U.S. 730, 737 (1987); *United States v. Inadi*, 475 U.S. at 396; *Tennessee v. Street*, 471 U.S. 409, 415 (1985).

[45] Prior to permitting a child victim to testify at all, the court must make a preliminary finding that the victim is competent. Courts have typically looked to four factors in assessing a child's competency to testify: (1) the child's present understanding of the difference between truth and falsity and an appreciation of the obligation or responsibility to speak the truth; (2) the child's mental capacity at the time of the occurrence in question to observe or receive accurate impressions of the occurrence; (3) the child's possession of memory sufficient to retain an independent recollection of the observations; and (4) the child's capacity to communicate and articulate the memory of such observation and his or her capacity to understand simple questions about the occurrence. Melton, Bulkley & Wulkan, "Competency of Children as Witnesses" in *Child Sexual Abuse and the Law* 125, 127 (J. Bulkley ed. 1981); *see also* J. Meyers, *Child Witness Law and Practice* § 3.2, at 54-59 (1987); D. Whitcomb, E. Shapiro & L. Stellwagen, *supra*, at 33.

counsel can fully cross-examine the witness. The defendant can freely consult with counsel by telephone during the witness's direct testimony and during cross-examination. And when a trial court permits a child-abuse victim to testify by video, it may take special steps to enhance the truth-determining process—such as by questioning the child concerning his or her testimony and cautioning the child as to the requirement to be truthful.

The Court has frequently recognized that the protections of the Bill of Rights must be interpreted in light of changing technological conditions. The Fourth Amendment applies, in certain circumstances, to electronic eavesdropping,[46] to surveillance by beeper,[47] to aerial reconnaissance,[48] and to other technologically sophisticated means of law enforcement. Nor would it be suggested that the First Amendment does not protect televised or other broadcast speech. By the same analysis, the Confrontation Clause ought not be interpreted to exclude confrontation via technological media that the Framers would not have foreseen.[49] As one jurist has put it:

> "There is nothing in the Constitution that says that the right to the confrontation of the accused must be two feet, three feet or within the same room . . . . [R]emoving those constraints that technology has removed, [permits an interpretation of the Confrontation Clause requiring] not necessarily physical confrontation in a courtroom, but confrontation through electronic means." [50]

Indeed, in some respects, televised or videotaped testimony may actually improve the jury's opportunity to observe the witness's demeanor.[51] As one commentator has remarked:

> Modern television techniques are capable of presenting clear and undistorted images, and in some instances, are an improvement over the view that the jury has of the witness. For example, with the use of a zoom lens and large television screens, the witness's facial details can be observed with great clarity.[52]

All these considerations led one state court to conclude, "this trial technique serves as the functional equivalent of in-court testimony." [53] The clear weight of state court authority is in accordance with this view.[54]

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[46] *Katz v. United States*, 389 U.S. 347 (1967).

[47] *United States v. Karo*, 468 U.S. 705 (1984).

[48] *Cf. Dow Chemical Co. v. United States*, 476 U.S. 227 (1986).

[49] At the time of this Court's early Confrontation Clause decisions, courts could not have conceived of an alternative to the witness's physical presence in the courtroom which would substantially fulfill the essential goals of the Confrontation Clause. *See* Comment, *The Young Victim*, *supra*, at 740. The same argument has equal applicability to the right of confrontation at common law. Rather than an absolute requirement of face-to-face confrontations, the better view of this Court's early cases and the common law requirement is that such confrontations were the only means conceivable, given the limits of available technology, which would adequately protect the rights of the accused. *See id.*

[50] *Child Victim Witness Protection Act of 1985: Hearings Before the Subcomm. on Juvenile Justice of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 95 (1985) (statement of H. Mark Kennedy, Circuit Court Judge, Montgomery County, Alabama).

[51] *See* Comment, *Balancing the Right to Confrontation and the Need to Protect Child Sexual Abuse Victims: Are Statutes Authorizing Televised Testimony Serving Their Purpose?*, 12 U. Puget Sound L. Rev. 109, 118 (1988).

[52] *Id.* at 118.

[53] *State v. Daniels*, 484 So. 2d 941, 945 (La. Ct. App. 1986).

[54] *See, e.g., Kansas City v. McCoy*, 525 S.W.2d 336, 339 (Mo. 1975) (televised testimony did not significantly affect the ability to question and observe the witness; jury impact found to be little different whether witness appeared in court in person or by television); *State v. Sheppard*, 484 A.2d at 1341 ("Videotape is sufficiently similar to live testimony to permit the jury to properly perform its function."); *People v. Algarin*, 129 Misc. 2d 1016, 498 N.Y.S.2d 977, 981 (1986) ("It is apparent to this court from a demonstration of the equipment used in this case that closed-circuit television has the capacity to present clear and accurate sounds and images to the defendant, the witness, the judge, the jury and the public. . . . [I]nstantaneous closed-circuit television can surely satisfy the dictates of the Confrontation Clause."); *see also Common-*

III. The Trial Court's Findings in the Present Case Satisfy the Confrontation Clause

In the present case, the Maryland Court of Appeals apparently conceded that the state had a compelling interest in safeguarding the integrity of the truth-determining process. But the lower court concluded that this interest could overcome Confrontation Clause values only in the rare cases where trial courts had forced a child-abuse witness to attempt to testify in the defendant's presence, and the child had broken down. We show below that there is simply no basis in precedent, public policy or common sense for the procedures that the Maryland Court of Appeals would impose on trial courts. Rather, we show that it is constitutionally permissible to implement protective measures for child abuse victims whenever a trial court has made case-specific findings—based on personal observation or expert testimony—that the child victim or witness would be likely to suffer emotional harm if forced to testify in the presence of defendant.

A. *The Trial Court's Findings*

In this case, the trial court ruled that the testimony of four victims of sexual abuse, children ages 4 to 7, should be taken by one-way closed circuit television.[55]

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wealth v. Willis, 716 S.W.2d at 228; *State v. Twist*, 528 A.2d 1250, 1258 (Me. 1987); J. Myers, *supra*, § 6.4, at 395. *But see Commonwealth v. Bergstrom*, 402 Mass. 534, 524 N.E.2d 366, 375-76 (1988) (Because of poor color, sound, and overall quality of transmission, it was an error to allow televising of child's testimony to jury.); *State v. Warford*, 223 Neb. 368, 389 N.W.2d 575, 582 (1986) (Testimony was inadmissible where camera frequently failed to provide the jury with a full view of the child and the examiner.).

[55] The statute authorizing this procedure is Section 9-102 of the Courts and Judicial Procedure Article of the Annotated Code of Maryland. Section 9-102, entitled "Testimony of victim in child abuse case by means of closed circuit television," provides in pertinent part:

> (a) (1) In a case of abuse of a child . . ., a court may order that the testimony of a child victim be taken outside the courtroom and shown in the courtroom by means of closed circuit television if:
>
> (i) The testimony is taken during the proceeding; and
>
> (ii) The judge determines that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate.

Md. Cts. & Jud. Proc. Code Ann. § 9-102 (1989).

Prior to making this ruling, the trial court heard testimony as to the likely effect that testimony in defendant's presence would have upon each child from therapists who had treated them and who had considerable experience working with abused children.[56]

As to one child, with whom she had spent between 20 and 30 hours, the therapist testified that:

> "it would be very difficult if not impossible for [the child] to sit in the same room with [defendant] and discuss the alleged abuse incidents. . . . [She] would probably stop talking and she would withdraw and curl up." [57]

As to a second child, whom she had seen in 18 therapy sessions, the therapist testified that the child saw the defendant as a " 'threatening figure,' " and added that the child had

> "had difficulty talking—making his disclosure to other people including police and protective services. He tends to change the subject which is his manner of avoiding the issue. He becomes agitated and depressed. He bursts into tears and would be unwilling or unable at that point to proceed." [58]

As to a third child, whom she had seen in 36 therapy sessions, the therapist stated:

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[56] *Craig v. State*, 76 Md. App. 250, 544 A.2d 784, 801-02 (1988), *rev'd*, 316 Md. 551, 560 A.2d 1120 (1989) (en banc), *cert. granted*, 1990 U.S. LEXIS 343.

[57] *Id.* at 801.

[58] *Id.*

> "As to [defendant], she perceives herself, again, as her life has been threatened, that of her parents and her sibling too. She believes that that [*sic*]—[defendant] is capable and willing to carry out those threats at home and [the child] is fearful of this person. I believe that that fear would impair her ability to sit in front of that person or to be in the same room with that person, would be unable to discuss or to share with the required individuals that information which she has to share regarding these allegations." [59]

As to the last child, who was treated by another therapist, a psychologist, that therapist remarked:

> "he has experienced [an] extreme level of high anxiety and distress by talking about this very traumatic event and that his ability to communicate would be grossly impaired if he were to testify in an open court in the presence of [defendant].[60]

After hearing this testimony, the trial court found as a fact that:

> "the testimony of each of these children in a courtroom will result in each child suffering serious emotional distress and such that each of these children cannot reasonably communicate and accordingly I believe there's a need and [it is] appropriate to direct that the testimony of these children be provided by way of closed circuit television consistent with the provisions of Section 9-102. . . ." [61]

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[59] *Id.* at 801-02.

[60] *Id.* at 802.

[61] *Id.* (ellipsis in original) As to that portion of these findings that refers to the effect of the children's testifying in the courtroom, the Maryland Court of Special Appeals, found that, in context,

> it is apparent that the court's concern was not so much forcing the children to testify in open court as requiring them to testify in the direct presence of [defendant]. We think it evident that the finding by the court, though couched in the statutory language, addressed that concern.

Id., n.14.

The Maryland Court of Appeals held that the trial court's actions failed to satisfy the Confrontation Clause.[62] Although opining that exceptions to the face-to-face requirement did theoretically exist, the court held that the trial court's case-specific findings were not specific enough.[63] The court further held that, under *Coy v. Iowa*, the trial court could not rely solely on the testimony of experts, but had to personally conduct " 'a particularized examination of all the circumstances concerning the impact of public testimony . . . upon the emotional health of the child.' " [64] And the court specifically held that this examination had to be conducted "in the presence of the defendant." Thus, even though the trial judge had personally examined the children in determining their competency,[65] that procedure purportedly failed to meet constitutional standards.[66]

B. *The Confrontation Clause Requires Only a Trial Court Determination that Face-To-Face Encounter with the Defendant Will Likely Cause Emotional Harm to the Child-Abuse Victim or Prevent the Victim From Effectively Communicating*

The decision of the Maryland Court of Appeals is wrong for a number of reasons. First, and most important, the lower court's requirement that a child-abuse victim be forced to attempt to testify in the defendant's presence requires the state itself to inflict on the child the precise emotional harm that Maryland's legislature has sought to prevent in authorizing televised testimony. There is nothing in the Confrontation Clause, its his-

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[62] *Craig v. State*, 316 Md. 551, 560 A.2d 1120 (1989).

[63] *Id.* at 1127-29.

[64] *Id.* at 1129 (quoting *Wildermuth v. State*, 310 Md. 496, 530 A.2d 275, 289 (1987) (quoting *People v. Algarin*, 498 N.Y.S.2d at 983)).

[65] *See id.* at 1128 n.11.

[66] *Id.* at 1128-29.

tory, or common sense that requires so callous and destructive a requirement.[67]

The Court of Appeals' requirement would inevitably inflict emotional harm on a significant number of children, who have already been damaged. This additional suffering is not needed. Expert testimony or personal observation permit a court to conclude, with reasonable reliability, that a child-abuse victim would likely suffer emotional harm from a face-to-face encounter.[68] And even if the trial court is wrong in its judgment, televised testimony does not materially compromise Confrontation Clause values, and may actually enhance them.

Second, the lower court apparently adopted a rigorous "least restrictive alternative" approach [69] that is without precedent in the context of the Confrontation Clause. Indeed, this Court in *Ohio v. Roberts* eschewed any "least restrictive alternative" analysis.[70] Given that televised confrontation provides a functional equivalent of face-to-face confrontation, the least restrictive alternative analysis of the lower court is inappropriate and would unduly frustrate compelling public interests.

Third, the lower court apparently applied the two-prong test requiring unavailability and indicia of reliability set forth in *Ohio v. Roberts*.[71] Under the *Roberts* test, as applied by the lower court, use of televised testimony would be allowable only if forcing the witness

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[67] *Cf. Pennsylvania v. Ritchie*, 480 U.S. 30 (1987).

[68] Courts routinely make comparable judgments in such matters as determining competency, assessing state of mind, and similar contexts.

[69] *See, e.g., Craig v. State*, 560 A.2d at 1128.

[70] 448 U.S. 56, 62-66 (1980).

[71] 448 U.S. 56. In *Ohio v. Roberts*, this Court held that "when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.'" *Id.* at 66.

to testify in the defendant's presence would render the witness "unavailable." [72] The lower court's "unavailability" requirement has no place in Confrontation Clause analysis.

This Court has squarely held that the *Ohio v. Roberts* test is not constitutionally mandated whenever a defendant's right to confrontation has arguably been abridged. In *United States v. Inadi*,[73] for example, this Court expressly rejected the argument that a finding of unavailability is necessary before the hearsay statement of a non-testifying coconspirator is admitted.[74] Moreover, televised testimony under the circumstances of this case is simply not analogous to the sort of hearsay statements at issue in *Roberts*. As set out above, substantially all of the functions served by confrontation are fulfilled by the use of televised or videotaped testimony.[75]

Properly understood, the Confrontation Clause imposes none of the detailed substantive and procedural requirements set out by the Maryland Court of Appeals. Rather, the appropriate balance between Confrontation Clause values and competing public policies is struck by a straight-

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[72] *Craig v. State*, 560 A.2d at 1126 ("The question of whether a child is unavailable in the *Roberts* sense should not be asked in terms of inability to testify in the ordinary courtroom setting, but in the much narrower terms of the witness's inability to testify in the presence of the accused."). *See also, Wildermuth v. State*, 530 A.2d 275.

[73] 475 U.S. 387.

[74] The Court in *Inadi* observed that:

> *Roberts* must be read consistently with the question it answered, the authority it cited, and its own facts. All of these indicate that *Roberts* simply reaffirmed a longstanding rule . . . that applies unavailability analysis to prior testimony. *Roberts* cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable.

Id. at 394.

[75] *See* Comment, *Balancing the Right to Confrontation*, *supra*, at 117.

forward requirement that the trial court find that face-to-face confrontation with the defendant will likely cause emotional harm to the child-abuse victim or prevent the child from effectively communicating. This formulation properly reflects the fact that televised testimony is the functional equivalent of face-to-face confrontation. And it will also ensure an appropriate measure of discretion for trial courts, which will inevitably be presented with a myriad of factual circumstances: these will range from extremely young and vulnerable victims of brutal sexual assaults to more mature and less vulnerable victims. Just as trial courts have long enjoyed substantial responsibility in applying the hearsay rule,[76] so it is appropriate to confide to them a broad authority to resolve the questions presented in varying types of child-abuse cases.[77]

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[76] 4 J. Weinstein & M. Berger, *supra*, ¶ 800[03], at 800-16 ("Since the trial judge must balance the need and the value of the [hearsay] evidence against the dangers it would pose, he may consider factors affecting either side of the equation.").

[77] This analysis is consistent with the majority opinion in *Coy v. Iowa*, which suggested that exceptions to its general requirement of face-to-face confrontation might exist where a challenged statute required "individualized findings that . . . [the particular child victim before the court] needed special protection." 108 S. Ct. at 2803. Justice O'Connor's concurring opinion in *Coy* elaborated upon this point, and would "permit use of a particular trial procedure that called for something other than face-to-face confrontation if that procedure was necessary to further an important public policy." *Id.* at 2804-05.

CONCLUSION

For the reasons stated above, the decision of the Maryland Court of Appeals should be reversed.

Respectfully submitted,

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